

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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VICKI WEST and WENDY FAGUNDES,
individually and on behalf of
others similarly situated,

NO. CIV. S-04-0438 WBS GGH

Plaintiffs,

v.

MEMORANDUM AND ORDER RE:
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT, AWARD
OF ATTORNEYS' FEES AND COSTS,
AND ADDITIONAL COMPENSATION TO
NAMED PLAINTIFFS

CIRCLE K STORES, INC.,

Defendant.

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Plaintiffs Vicki West and Wendy Fagundes¹ sought to bring a class action suit against defendant Circle K Stores, Inc. for alleged violations of the California Labor Code sections 226.7, 227.3, and California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof. Code §§ 17200-17210. On June 13, 2006, this

¹ In their brief in support of their motion to certify the class, plaintiffs corrected the spelling of "Fagundes," which had previously been spelled "Fegundes."

1 court entered an order preliminarily approving the settlement
2 reached by the parties. Presently before the court are
3 plaintiffs' applications for final approval of the class action
4 settlement, attorneys' fees and costs, and additional
5 compensation for named plaintiffs. For the following reasons,
6 the court will grant final approval of the settlement, attorneys'
7 fees and costs, and additional compensation.

8 I. Factual and Procedural Background

9 On March 3, 2004, plaintiffs filed a class action
10 complaint claiming that defendant failed to pay (1) overtime
11 wages, (2) administrative leave wages, and (3) accrued but unused
12 vacation wages, all in violation of state law. (Compl. ¶ 17.)
13 On July 15, 2005, this court granted in part plaintiffs' motion
14 to amend their complaint. (July 15, 2005 Order at 2-3.) The
15 amendments dropped some of the claims of one proposed subclass
16 (managers) and added Wendy Fagundes as a named plaintiff,
17 representing an additional class of employees claiming that
18 defendant failed to pay meal and break wages. (Id. at 3-4.)

19 On March 20, 2006, plaintiffs moved to certify two
20 distinct classes based on their remaining claims: (1) a "meal
21 period class" defined as "all hourly store employees employed by
22 defendant in California since October 1, 2000, who did not
23 receive off-duty meal periods" and (2) a "vacation class" defined
24 as "all employees employed in California by defendant at any time
25 since March 3, 2000, who forfeited accrued but unused vacation
under defendant's vacation policy." (Pl.'s Mot. for Class Cert.
26 1.) However, before the court could hear that motion, the
27 parties attended a day long mediation with Justice Richard Neal

1 (retired) where they agreed to settlement terms.

2 The court preliminarily approved this settlement in an
3 order issued on June 13, 2006, and provisionally certified the
4 two classes for the purpose of settlement. The court
5 additionally appointed Vicki West as the representative of the
6 vacation class, Wendy Fagundes as the representative of the meal
7 period class, the law firm of McInerney & Jones as lead counsel,
8 and Rosenthal & Company, LLC as the claims administrator. The
9 court also approved the class claim form, the exclusion form, and
10 the notice of settlement with minor modifications as to
11 scheduling, and directed the claims administrator to send copies
12 of these three documents to all identifiable class members within
13 thirty days of the order's issuance. The court is unaware of any
14 relevant factual or legal developments that would alter its
15 previous analysis, and plaintiffs' counsel represented at oral
16 argument that he did not encounter any such change. Finally, the
17 court set the Final Fairness Hearing on October 16, 2006, at 1:30
18 p.m. After conducting the fairness hearing and carefully
19 considering the settlement terms, the court now addresses whether
20 the proposed settlement is fair, reasonable, and adequate, such
21 that it should be approved by the court; whether a judgment as
22 provided in the stipulation should be entered for final approval
23 of the settlement; and whether class counsel's applications for
24 attorneys' fees and costs, as well as additional compensation for
25 named plaintiffs, should be granted.

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1 II. Discussion

2 A. Legal Standard

3 The Ninth Circuit has declared that a strong judicial
4 policy favors settlement of class actions. Class Plaintiffs v.
5 City of Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992). "There is
6 an overriding public interest in settling and quieting
7 litigation" that is "particularly true in class action suits."
8 Van Bronkhorst v. Safeco Corp., 529 F.2d 943, 950 (9th Cir.
9 1976). Nevertheless, where "parties reach a settlement agreement
10 prior to class certification, courts must peruse the proposed
11 compromise to ratify both the propriety of the certification and
12 the fairness of the settlement." Staton v. Boeing Co., 327 F.3d
13 938, 952 (9th Cir. 2003). Having conducted the first inquiry
14 regarding the propriety of certification, the "court must
15 carefully consider "whether a proposed settlement is
16 fundamentally fair, adequate, and reasonable,' recognizing that
17 '[i]t is the settlement taken as a whole, rather than the
18 individual component parts, that must be examined for overall
19 fairness'" Id. at 952 (quoting Hanlon v. Chrysler Corp.,
20 150 F.3d 1011, 1026 (9th Cir. 1998)); see also Fed. R. Civ. P.
21 23(e).

22 At the fairness hearing, the court should entertain any
23 objections by putative class members to: (1) the treatment of
24 this litigation as a class action and/or (2) the terms of the
25 settlement. Diaz v. Trust Territory of Pac. Islands, 876 F.2d
26 1401, 1408 (9th Cir. 1989) (holding that prior to approving the
27 dismissal or compromise of claims containing class allegations,
28 district courts must, pursuant to Rule 23(e), hold a hearing to

1 "inquire into the terms and circumstances of any dismissal or
2 compromise to ensure that it is not collusive or prejudicial").
3 Following the fairness hearing, the court will make a final
4 determination as to whether the parties should be allowed to
5 settle the class action pursuant to the terms agreed upon. Nat'l
6 Rural Telecomms. Coop. v. DIRECTV, Inc., 221 F.R.D. 523, 525
7 (C.D. Cal. 2004).

8 In determining whether the terms of the parties'
9 settlement are fair, adequate, and reasonable, the court must
10 balance several factors, including:

11 the strength of the plaintiffs' case; the risk,
12 expense, complexity, and likely duration of further
13 litigation; the risk of maintaining class action status
14 throughout the trial; the amount offered in settlement;
15 the extent of discovery completed and the stage of the
proceedings; the experience and views of counsel; the
presence of a governmental participant; and the
reaction of the class members to the proposed
settlement.

16 Hanlon, 150 F.3d at 1026. But see Molski v. Gleich, 318 F.3d
17 937, 953-54 (9th Cir. 2003) (noting that a district court need
18 only consider some of these factors--namely those designed to
19 protect absentees).

20 A. Terms of the Settlement Agreement

21 The key terms of the stipulation and settlement are as
22 follows:

23 1. Class Definitions: the meal period class is defined as "All
24 hourly employees employed by Circle K Stores, Inc. in the
25 state of California from October 1, 2000 through the date
26 the Court grants preliminary approval of this Settlement."
27 The vacation class is defined as "All employees employed by
28 Circle K Stores, Inc. in the state of California from March

1 3, 2000 through the date the Court grants preliminary
2 approval of this Settlement who did not have all their
3 accrued but unused vacation carried forward from year to
4 year." The agreement excludes from the class employees of
5 franchises who do/did not actually work for defendant Circle
6 K Stores, Inc. (June 1, 2006 Jones Decl. Ex. A (Joint Stip.
7 of Settlement & Release ("Settlement") ¶ 6).)

8 2. Settlement Amount: Defendant agrees to a "total payout"
9 settlement of five million dollars (\$5,000,000). Of this
10 amount, three million eight hundred thousand dollars
11 (\$3,800,000) is allocated to the meal period class and one
12 million two hundred thousand dollars (\$1,200,000) is
13 allocated to the vacation class. (Id. ¶ 16.)

14 3. Deductions: attorneys' fees (up to 30%), plaintiffs' costs
15 (up to \$25,000), "service payments" to the class
16 representatives (up to \$15,000 each), and claims
17 administration costs (up to \$150,000) will be deducted from
18 defendant's total liability of \$5,000,000. With the
19 exception of the service payments, the meal period class
20 will bear 76% of these costs and fees; the vacation class
21 will bear the remainder. (Id. ¶ 15(d).)

22 4. Award Allocations: Meal period class members who file timely
23 claims will receive a proportionate share of the \$3,800,000
24 class settlement amount, minus costs, fees, and service
25 payments. A member's share will be based on the number of
26 weeks she worked for defendant during the class period and
27 this number will be determined based on the total number of
28 days worked divided by seven. (Id. ¶ 15(d)(i)(a).) The

1 parties estimate that this approach will at a minimum yield
2 an \$8 per week payment for each class member, resulting in
3 payments in excess of \$2,600 for employees that worked
4 throughout the entire class period. (P. & A. in Supp. of
5 Mot. for Prelim. Approv. 8.) Vacation class members who
6 file timely claims will likewise receive a proportionate
7 share of the \$1,200,000 class settlement amount, minus
8 costs, fees, and service payments. After all claims are
9 filed, the vacation class award will be divided by the
10 number of claimed vacation hours, yielding a per hour
11 payment. (June 1, 2006 Jones Decl. Ex. A Settlement ¶
12 15(d)(i)(b)). The parties anticipate that this will result
13 in at least a \$13 per hour payment for employees who, on
14 average, were making \$7 per hour. (P. & A. in Supp. of Mot.
15 for Prelim. Approval 8-9.)

16 5. Claims Procedures: Members of each class will receive two
17 forms sent out by the Claims Administrator, Rosenthal &
18 Company LLC. (June 1, 2006 Jones Decl. Ex. A Settlement ¶¶
19 15(d)(ix), 22(h)). One will be a preprinted Class Claims
20 Form that, based on defendant's records, will establish
21 either the number of weeks worked (for meal period class
22 members) or the number of vacation days owed (for vacation
23 class members). (Id. ¶ 15(d)(ix)(a)-(b).) Class members
24 will also receive a Request for Exclusion Form that will
25 advise them on how to opt out of the class action
26 settlement. (Id.) These forms will be sent, along with a
27 notice announcement detailing the history of this litigation
28 and further explaining the terms of the settlement, no more

1 than twenty (20) days from the date of this order. (Id. ¶
2 18(c).) Class members will have sixty (60) days from the
3 date that notice is mailed to submit a claim and forty-five
4 (45) days to opt out. (June 1, 2006 Jones Decl. Ex. D
5 (Proposed Notice).) Payments to class claimants will be
6 mailed by the claims administrator within twenty (20) days
7 of the final approval of the settlement. (Id. Ex. A
8 (Settlement ¶ 20).)

9 6. Release: Class members who do not opt out of the class
10 action, even if they do not file a claim, are forever barred
11 from bringing claims for failure to provide meal or rest
12 breaks from October 1, 2000, until this settlement is
13 finally approved, and from bringing claims for failure to
14 annually carry over accrued but unused vacation from March
15 3, 2000, until this settlement is finally approved. Id. Ex.
16 D (Proposed Notice).) The release does not cover employees
17 who did not actually work for defendant, but rather worked
18 for a franchisee. Additionally, the release does not apply
19 to claims arising after December 2003 against ConocoPhillips
20 (which sold defendant Circle K Stores, Inc. through a stock
21 sale in December 2003 and absorbed some of defendant's
22 existing employees through "migration"). (Id.; Apr. 7, 2006
23 Jones Decl. Ex. F (Prince Dep. 74:8-75:3).)

24 B. Factor Analysis

25 1. Strength of the Plaintiff's Case

26 Counsel for both parties have been actively engaged in
27 this litigation for over two years and have diligently pursued
28 the necessary discovery. Certain aspects of plaintiffs' case

1 were quite strong. From deposition testimony, it was clear that
2 defendant had not carried forward accrued but unused vacation
3 from year to year for a large number of employees. (Application
4 for Final Approval of Settlement 6.) Moreover, defendant
5 acknowledged that it had a blanket policy of preventing employees
6 from taking meal periods because of the "nature of the work" in
7 the convenience store industry. (Id.) Defendant has since
8 changed its policy and now allows off-duty meal periods when more
9 than one employee works on a given shift. (Id.)

10 2. Risk, Expense, Complexity, and Likely Duration of
11 Further Litigation

12 Despite having significantly developed the facts in the
13 case, both sides faced significant uncertainty because the claims
14 (in particular the meal period class claim) encompass unsettled
15 legal issues. The complexity and duration of further litigation
16 was likely to be considerable. There were over 10,000 potential
17 class members in this case. Completing discovery (in particular,
18 depositions) in a case with such a large class would have been
19 extremely costly. Additionally, plaintiffs were proceeding
20 against a large and sophisticated defendant, who vigorously
21 defended its position until settlement was reached. (See Apr. 3,
22 2006 Def.'s Opp'n to Mot. for Class Cert.; Def.'s Objections to
23 Request for Judicial Notice; May 31, 2006 Stip. & Proposed Order
24 for Prelim. Approval of Settlement.) The hotly-contested nature
25 of this case prior to settlement further indicates that
26 plaintiffs' counsel assumed some degree of risk by proceeding
27 with this litigation. These circumstances and attendant risks
28 favor settlement. Hanlon, 150 F.3d at 1026.

1 3. Risk of Maintaining Class Action Status Throughout
2 the Trial

3 Further, it was not clear that the classes would remain
4 intact if trial proceeded. The California Supreme Court is
5 currently resolving a split amongst California Courts of Appeal
6 that would affect the outcome of the case--namely, whether the
7 remedy provided by Labor Code § 226.7 should be considered a wage
8 or a penalty. See Murphy v. Kenneth Cole Prods., Inc., 134 Cal.
9 App. 4th 728, 751 (2005), review granted and opinion superceded
10 by Murphy v. Kenneth Cole Prods., Inc., 40 Cal. Rptr. 3d 750
11 (2006). If the California Supreme Court determines that the
12 remedy under this labor code section is appropriately considered
13 a penalty, a one-year statute of limitations would apply to the
14 meal break class, which would cut the length of the class period
15 in half. It is additionally unclear whether the remedy provided
16 by California Business & Professions Code § 17203 provides a
17 remedy that is a wage or a penalty. Cortez v. Purolator Air
18 Filtration Prods. Co., 23 Cal.4th 163, 173 (2000). The
19 resolution of this question would also affect what statute of
20 limitations is applied to the claims in this case. (See Feb. 14,
21 2006 Order re: Motion for Summ. J. 4-7.) Further, the court has
22 previously noted that defendant raised persuasive arguments
23 regarding the commonality and typicality of the meal period
24 class. (June 13, 2006 Order 7-12.) Thus, the settlement ensures
25 that a more inclusive meal period class will obtain relief than
26 may otherwise be the case, which counsels for settlement.

27 4. Amount Offered in Settlement

28 The total amount agreed to in the settlement is a

1 "total payout" of \$5,000,000, regardless of how many claims are
2 ultimately received. Subtracting the attorneys' fees, litigation
3 costs, enhancement awards, and administrative costs, the net
4 result is that the meal period class would be compensated with
5 \$2,712,884.30 and the vacation class would be compensated with
6 \$846,437.20. (Charles A. Jones Decl. ¶ 6.) The meal period
7 class members with timely and valid claims contend that they
8 worked approximately 197,468.64 weeks² without meal periods,
9 which means that each claimant in this class stands to receive
10 between \$12.93 and \$13.73 for omitted meal breaks per week of
11 work. (Id. ¶ 8.) This means, in turn, that the average member
12 of this class would receive between \$3,845.64 and \$4,083.58.
13 (Id.) The members of the vacation class will receive between
14 \$15.00 and \$17.74, depending on how the claim administrator
15 resolves disputes regarding work weeks, for every hour of
16 vacation forfeited. (Id. ¶ 9.) The net recovery for plaintiffs
17 is greater than originally anticipated, and is therefore greater
18 than the amount plaintiffs were informed they would receive in
19 the notice. (Jones Decl. Ex. B (Class Notice); Application for
20 Final Approval of Settlement 9; Application for Attorneys' Fees &
21 Costs 14.) Thus, because plaintiffs are ensured compensation for
22 the injury they suffered, and the rate of compensation appears to
23 be fair and reasonable, this factor weighs in favor of approving
24 the settlement.

25 5. Extent of Discovery Completed and the Stage of the
26

27 ² This number is somewhat in dispute, and may yet
28 increase by approximately 12,296.09 weeks. (Jones Decl. Ex. G
(John Keane Decl. ¶ 17).)

Proceedings

The complaint in this case was filed in March, 2004, and has been actively litigated since that time. During discovery, plaintiffs served on defendant thirty-nine interrogatories, seventy-four requests for production of documents, and fifteen requests for admissions. (Pls.' Application for Final Approval of Settlement 4.) Defendant produced more than 2,000 pages of documents in response to these discovery requests. (Id.) Defendant served on plaintiffs eighty requests for production of documents and twenty-seven interrogatories. (Id.) Finally, eight depositions have been conducted to date--plaintiffs deposed several of defendant's employees and defendant's designated expert, while defendant deposed both of the proposed class representatives. (Id.) Thus, substantial discovery had been conducted at the time the parties agreed to settle the case; additionally, the court had ruled on a motion for partial summary judgment and was considering a motion to certify the class. The advanced stage of the proceedings suggests that the parties had carefully investigated the claims before reaching resolution. Thus, this factor weighs in favor of approving the settlement.

6. Experience and Views of Counsel

23 _____The law firm of McInerney & Jones, counsel for
24 plaintiffs in this action, has previously represented plaintiffs
25 in more than thirty class actions over the past sixteen years,
26 all of which involved labor and employment law. (June 1, 2006
27 Jones Decl. ¶ 4.)) Many of these class actions have involved
28 interpretation of California's labor code. (Id.) In fact,

1 McInerney & Jones represent class action plaintiffs exclusively.
2 (Application for Final Approval of Settlement 2.) McInerney &
3 Jones has also settled more than fifteen class actions related to
4 wage and hour disputes. (June 1, 2006 Jones Decl. ¶ 4.)
5 Additionally, counsel in this case have tried more than ten class
6 actions involving overtime pay through certification, and have
7 lost certification in a few instances. (Pls.' Application for
8 Final Approval of Settlement 3.) Thus, counsel are familiar with
9 the attendant risks of representing plaintiffs in class action
10 suits. (Id.)

11 Moreover, plaintiffs' counsel have indicated that they
12 are pleased with the result obtained in this settlement, and that
13 they believe it is fair and reasonable. With regard to class
14 action settlements, the opinions of counsel should be given
15 considerable weight both because of counsel's familiarity with
16 this litigation and previous experience with cases such as these.
17 In re Wash. Public Power Supply System Sec. Litiq., 720 F. Supp.
18 1379, 1392 (D. Ariz. 1989) (citing Officers for Justice v. Civil
19 Service Com'n of City and County of S.F., 688 F.2d 615, 625 (9th
20 Cir. 1982)). The court has observed that the litigation has been
21 appropriately characterized by aggressive and capable advocacy on
22 both sides. As in the case of In re Washington, "[t]here is
23 likewise every reason to conclude that settlement negotiations
24 were vigorously conducted at arms' length and without any
25 suggestion of undue influence." Id. at 1392. Thus, this factor
26 supports approval of the settlement agreement.

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1 7. Presence of a Governmental Participant

2 This factor is irrelevant to the court's analysis, as
3 no governmental entity participated in this class action.

4 8. Reaction of the Class Members to the Proposed
5 Settlement

6 Notice of the proposed settlement was mailed to each of
7 the potential members of the settlement classes, along with a
8 claim form and a request for exclusion form. (Oct. 2, 2006 Jones
9 Decl. Ex. B, E, & F.) The notice complied with Federal Rule of
10 Civil Procedure 23(e). It informed potential class members what
11 the minimum amount of money was that they could expect to receive
12 under the settlement, how settlement awards would be calculated,
13 how to dispute defendant's data regarding work week hours, the
14 procedure for objecting more generally or excluding oneself
15 altogether from the settlement, the amount of fees and costs that
16 would be paid out of the settlement, and the date of the final
17 approval hearing. (Id. Ex. B.)

18 The deadline for objecting to the settlement was August
19 21, 2006, and class members did not file any objections to the
20 terms of the settlement, the amount of fees and costs sought, or
21 the service payments to the named plaintiffs. (Oct. 2, 2006
22 Jones Decl. ¶ 3; Keane Decl. ¶ 15.) Moreover, the settlement
23 underestimated the amount of relief plaintiffs would obtain and
24 overestimated the amount of attorneys' fees that counsel
25 ultimately sought. (Application for Final Approval of Settlement
26 9-10.) In particular, the notice informed plaintiffs of the
27 upper bound of attorneys' fees, and plaintiffs' counsel are now
28 requesting \$250,000 less in attorneys' fees. (Jones Decl. Ex. B

1 (Class Notice).) The lack of objections to the settlement is
2 perhaps the most significant factor weighing in favor of
3 settlement.³

4 C. Award of Attorneys' Fees

5 Federal Rule of Civil Procedure 23(h) provides that
6 "[i]n an action certified as a class action, the court may award
7 reasonable attorneys' fees and nontaxable costs authorized by law
8 or by agreement of the parties" "In assessing attorneys'
9 fees, courts typically apply either the percentage-of-recovery
10 method or the lodestar method. The percentage-of-recovery method
11 is generally favored in common fund cases because it allows
12 courts to award fees from the fund in a manner that rewards
13 counsel for success and penalizes it for failure." In re Rite
14 Aid Corp. Sec. Litig., 396 F.3d 294, 300 (3rd Cir. 2005)
15 (quotations and citation omitted).

16 The Ninth Circuit has noted that, in class actions,
17 "fee awards range from 20 percent to 30 percent of the fund
18 created." Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268,
19 272 (9th Cir. 1989). The court additionally noted with approval
20 "that one court has concluded that the 'bench mark' percentage
21 for the fee award should be 25 percent." Id. That percentage

22
23 ³ Although not one of the factors the court must
24 consider, an additional consideration favoring settlement is
25 that, after this lawsuit was filed, defendant changed some of its
26 employment practices regarding the issues involved in this
27 litigation. Notably, defendant has created a new policy allowing
28 off-duty meal periods when multiple employees are working on a
particular shift. (Pls.' Application for Final Approval of
Settlement 6.) Defendant has also corrected its practices by
allowing employees to carry forward their accrued but unused
vacation from year to year. (Oct. 19, 2006 Charles A. Jones
Decl. ¶ 8.)

1 may be adjusted in either direction "to account for any unusual
2 circumstances involved in this case." Id. (emphasis added).
3 "Courts may observe the following factors when determining
4 whether the benchmark percentage should be adjusted: (1) the
5 result obtained for the class; (2) the effort expended by
6 counsel; (3) counsel's experience; (4) counsel's skill; (5) the
7 complexity of the issues; (6) the risks of non-payment assumed by
8 counsel; (7) the reaction of the class; and (8) comparison with
9 counsel's loadstar." In re Heritage Bond Litiq., No. 02-1475,
10 2005 WL 1594403, at *18 (C.D. Cal. 2005) (citations omitted).

11 The proposed settlement appropriately takes a
12 percentage-of-recovery approach to calculate fees. Although the
13 settlement allows for thirty percent of the settlement fund to be
14 awarded as attorneys' fees, plaintiffs' counsel requests twenty-
15 five percent of the fund. There are no unusual circumstances
16 here that would justify a downward departure from this benchmark
17 amount.

18 On the contrary, an application of the factors noted
19 above demonstrates that the award is eminently reasonable. These
20 factors overlap with the factors the court has already considered
21 in evaluating the settlement itself, and the court has previously
22 noted that factors one, three, five, six, and seven counsel in
23 favor of approval of the settlement. With regard to the second
24 factor, the effort expended by counsel in this case was
25 considerable. Plaintiffs filed a motion to amend the complaint,
26 which was opposed by defendants, and defendants filed a motion
27 for summary judgment against the meal period claims, the
28 resolution of which turned upon complex and divergent appellate

1 opinions regarding state law. (See Feb. 14, 2006 Order re:
2 Motion for Summ. J. 6-7.) Plaintiffs prevailed on both of these
3 motions. Moreover, as to factor four, counsel's skill has been
4 adequately demonstrated by their success in this litigation.
5 Thus, these two factors suggest that the amount of attorneys'
6 fees requested is appropriate.

7 The final factor is whether the amount counsel requests
8 is consistent with what the lodestar amount would be.
9 Plaintiffs' counsel has submitted a declaration indicating that
10 he estimates he has spent 1,674 hours on this case over the
11 course of two and a half years, and that he anticipates he will
12 spend at least sixty more hours "resolving claim disputes,
13 talking with class members and the claims administrator about pay
14 outs, finalizing the claims administration process and the
15 allocation of taxes, and providing a final accounting to the
16 court." (Oct. 19, 2005 Jones Decl. ¶ 5.) Given that counsel
17 seeks \$1,225,000 in attorneys' fees, this means that the
18 settlement compensates counsel at an hourly rate of approximately
19 \$706. There are three attorneys at the firm that has represented
20 plaintiffs in this action. To date, Mr. Jones' rate has been
21 approximately \$450 an hour, and the same billing rate applies for
22 another attorney at his firm, Kelly McInerney. (Id.) The
23 billing rate for the lead attorney at the firm, Kevin J.
24 McInerney, is in excess of \$700 an hour. (Id.) Mr. Jones worked
25 approximately seventy percent of the hours expended on this case,
26 Ms. McInerney worked approximately twenty percent of those hours,
27 and Mr. McInerney is responsible for the remainder of the work
28 (ten percent of the total hours). Thus, the lodestar calculation

1 indicates that counsel is being compensated at rate elevated from
2 his normal rate of pay, but not to an egregiously high level.
3 Additionally, to the extent the hours expended are attributable
4 to Mr. McInerney, the lodestar calculation is consistent with Mr.
5 McInerney's standard billing rate.

6 Significantly, counsel simply seeks the benchmark
7 percentage rate set by the Ninth Circuit. Although the
8 percentage calculation is not a perfect approximation of what a
9 lodestar calculation would be, excess compensation to this degree
10 is not an "unusual circumstance" that would justify a downward
11 departure from the benchmark. Paul, Johnson, Alston, & Hunt, 886
12 F.2d at 272. Additionally, not all of the factors must be met to
13 justify a fee award, and the rest of the factors clearly weigh in
14 favor of granting a fee award of this amount. In sum, the factor
15 analysis weighs in favor of granting plaintiffs' counsel twenty-
16 five percent of the common fund for their attorneys' fees, and
17 the court will therefore allow the award in the amount requested.

18 D. Costs

19 "There is no doubt that an attorney who has created a
20 common fund for the benefit of the class is entitled to
21 reimbursement of reasonable litigation expenses from that fund."
22 In re Heritage Bond Litiq., 2005 WL 1594403, at *23 (quoting In
23 re Gen. Instruments Sec. Litiq., 209 F. Supp. 2d 423, 434 (E.D.
24 Pa. 2001) (omitting citations and alterations)). Class counsel
25 has submitted its itemized costs relating to travel, mailing
26 expenses, mediation, depositions/transcriptions, legal research,
27 photocopies, filings, court call, and facsimiles. (Oct. 2, 2006
28 Jones Decl. Ex. D.) The court finds that these are reasonable

1 litigation expenses that warrant compensation.

2 Additionally, the claims administrator, Rosenthal &
3 Company, LLC, applies for costs incurred in administering the
4 settlement in the amount of \$145,536.25. Rosenthal & Company has
5 incurred \$96,836.25 in costs to date, and anticipates that it
6 will yet incur an additional \$48,700 in administrative costs
7 pertaining to the settlement. (Jones Decl. Ex. G (Keane Decl. ¶
8 18.) These additional costs will involve processing claims that
9 are late, deficient, or disputed, sending denial letters, issuing
10 checks, completing tax returns, and issuing tax documents. (Id.)
11 Because this relief could not be dispersed to the class without
12 the efforts of the class administrator, and the amount requested
13 appears reasonable given the size of the class, the court will
14 award reimbursement for expenses incurred to the claims
15 administrator.

16 E. Enhancement Award for Class Representatives

17 The settlement proposes a \$15,000 "enhancement award"
18 for each named plaintiff. The court recognizes that "a class
19 representative is entitled to some compensation for the expense
20 he or she incurred on behalf of the class lest individuals find
21 insufficient inducement to lend their names and services to the
22 class action." In re Oracle Secs. Litig., No. C-90-0931, 1994 WL
23 502054, at *1 (N.D. Cal. June 18, 1994) (citing In re Continental
24 Ill. Secs. Litig., 962 F.2d 566, 571 (7th Cir. 1992)). "Such
25 payments, however, must be reasonable in light of applicable
26 circumstances, and not 'unfair' to other class members." Smith
27 v. Tower Loan of Miss., Inc., 216 F.R.D. 338, 368 (S.D. Miss.
28 2003) (citation omitted); see also In re Oracle Secs. Litig.,

1 1994 WL 502054 at *1 (reducing requested payment of \$2,500 to
2 \$500 for spending "between two and five hours undergoing
3 depositions and . . . respond[ing] to a few narrow document
4 discovery requests").

5 The proposed payment is not particularly unfair to
6 other class members, given that it will not significantly reduce
7 the amount of settlement funds available to the rest of the
8 class. None of the class members have objected to the amount of
9 additional compensation sought by the named plaintiffs. Notably,
10 Fagundes, who remains in the employ of defendant's franchisee,
11 may have risked retaliation by her employer. The same, however,
12 cannot be said for West, who left Circle K in 2003.

13 West and Fagundes have subordinated their individual
14 claims to serve as named plaintiffs in this class action.
15 Plaintiffs' counsel explains that Fagundes could have brought a
16 claim against defendant for between \$11,896.80 and \$14,871, but
17 is limited to recovery of between \$3,800 and \$4,000 under the
18 terms of the settlement. (Application for Additional
19 Compensation for Named Plaintiffs 3.) West has devoted over one
20 hundred hours to assist counsel with this case, and Fagundes
21 estimates that she has spent eighty hours assisting counsel.
22 (Jones Decl. Ex I (West Decl. ¶ 2); Ex. H (Fagundes Decl. ¶ 2).)

23 Moreover, other courts have awarded comparable service
24 payments to named plaintiffs. In re Domestic Air Transp., 148
25 F.R.D. 297, 357-58 (N.D. Ga. 1993) (awarding \$142,500 total to
26 class representatives out of \$50 million fund); In re Dun &
27 Bradstreet, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (awarding
28 \$215,000 to several class representatives out of an \$18 million

1 fund). Given the amount of time that named plaintiffs have
2 invested in this case, and the fact that Fagundes risked
3 retaliation from her employer, the court finds plaintiffs'
4 enhancement payments of \$15,000 each to be reasonable.

5 III. Conclusion

6 Based on the foregoing, the court approves the
7 settlement set forth in the Settlement Agreement and finds that
8 the settlement is fair, reasonable, adequate, and in the best
9 interest of the settlement classes. In view of the diligent
10 efforts of counsel in a complex area of law and the favorable
11 outcome obtained for class members, the court finds an award of
12 twenty-five percent (25%) of the \$5,000,000 common fund, to be an
13 appropriate amount for attorneys' fees. The court also finds
14 that the costs requested by counsel are reasonable and fair.
15 Consummation of the settlement in accordance with the terms and
16 provisions of the Settlement Agreement is therefore approved, and
17 the definitions provided in the Settlement Agreement shall apply
18 to the terms used herein. The Settlement Agreement shall be
19 binding upon all members of the class who did not timely elect to
20 be excluded from the classes.

21 IT IS THEREFORE ORDERED that plaintiffs' motion for
22 final approval of settlement be, and the same hereby is, GRANTED.

23 IT IS FURTHER ORDERED that:

24 (1) for the purpose of this settlement, as described in
25 the court's order of June 12, 2006, good cause exists to certify
26 two settlement classes of plaintiffs: (a) All hourly employees
27 employed by Circle K Stores, Inc. in the state of California from
28 October 1, 2000 through the date the Court grants preliminary

1 approval of this Settlement; and (b) All employees employed by
2 Circle K Stores, Inc. in the state of California from March 3,
3 2000 through the date the Court grants preliminary approval of
4 this Settlement who did not have all their accrued but unused
5 vacation carried forward from year to year. The court reaffirms
6 its order certifying the classes, including its findings that:

7 (a) the settlement classes are so numerous as to
8 make joinder of all class members impracticable.

9 (b) there are common questions of law and fact as
10 to each settlement class.

11 (c) named plaintiffs' claims are typical of the
12 claims of the members of the settlement classes.

13 (c) plaintiffs and class counsel will fairly and
14 adequately represent and protect the interests of settlement
15 classes, and have done so by entering into this Settlement
16 Agreement.

17 (d) questions of law and fact common to the
18 members of each settlement class predominate over any questions
19 affecting any individual member, and a class action is the
20 superior method for pursuing the claims at issue here.

21 (2) the notice given to the classes of the settlement
22 as described in the Settlement Agreement and the court's order of
23 June 12, 2006, constituted the best notice practicable under the
24 circumstances. The Notice program provided due and adequate
25 notice of these proceedings and of the matters set forth in the
26 notice, including the settlement set forth in the Settlement
27 Agreement, to all persons and entities entitled to such notice,
28 and said notice fully satisfied the requirements of due process

1 and applicable law. The court further finds that the mailing of
2 the notice of settlement to the putative class members was
3 properly administered by Rosenthal & Company, LLC, pursuant to
4 court order.

5 (3) defendant shall pay the total sum of \$5,000,000 to
6 a gross settlement fund to be distributed in a manner more fully
7 set forth below and as described in the court's June 12, 2006
8 order. This sum shall not be decreased or increased in any
9 respect and shall represent the total consideration to be paid by
10 defendant in connection with the settlement. Defendant shall
11 have no further liability for costs, expenses, interest, attorney
12 fees, or for any other charge, expense, or liability.

13 (4) as detailed below, the following payments shall be
14 made from the settlement fund: payment of attorneys' fees and
15 costs, payment of an enhancement award to the class
16 representatives, and payment of costs and administrative fees to
17 the claims administrator, Rosenthal & Company. Once all of the
18 above payments have been made, all amounts remaining in the
19 settlement fund shall be distributed to the class members who
20 timely filed valid claim forms as described in the Settlement
21 Agreement at ¶ 15 and by the court's June 12, 2006 preliminary
22 approval order.

23 (5) plaintiffs' applications for attorneys' fees in
24 the amount of \$1,225,000, litigation costs in the amount of
25 \$15,142.39, and administrative costs in the amount of \$145,536.25
26 be, and the same hereby are, GRANTED, provided that seventy-six
27 percent (76%) of the award for fees and costs shall be paid from
28 the gross settlement fund for the meal period class, and twenty-

1 four percent (24%) of the award shall be paid from the gross
2 settlement fund for the vacation class.

3 (6) named plaintiffs Vicki West and Wendy Fagundes be,
4 and the same hereby are, awarded additional compensation in the
5 amount of \$15,000 each, with the condition that West's
6 compensation shall be paid from the gross settlement fund for the
7 vacation class, and Fagundes' compensation shall be paid from the
8 gross settlement fund for the meal period class.

9 (7) the claims administrator, Rosenthal & Company,
10 shall calculate the amount of each class members' settlement
11 check within fifteen (15) days of the entry of this order and
12 provide an accounting to both plaintiffs' and defendant's
13 counsel. The distribution and mailing of settlement awards will
14 take place as provided in the Settlement Agreement at ¶ 15.
15 Specifically, the claims administrator shall cause the settlement
16 awards to be mailed to the class members who timely submitted
17 valid claim forms within twenty (20) calendar days following the
18 court's final approval of the settlement. At the same time the
19 claims administrator causes the settlement awards to be mailed to
20 the class members, the claims administrator shall also cause the
21 attorneys' fees and costs awarded by this court to be mailed to
22 class counsel, the administrative costs awarded to the claims
23 administrator to be paid to Rosenthal & Company, and the
24 enhancement awards ordered by the court to be mailed to the class
25 representatives, Vicki West and Wendy Fagundes.

26 (8) proof of the payments outlined in the paragraphs
27 above will be filed with the court by the claims administrator
28 and provided to plaintiffs' and defendant's counsel. Within ten

1 days after proof of payment has been filed with the court by the
2 claims administrator, the parties shall execute and file a
3 proposed final judgment and dismissal of this action.

4 (9) any settlement checks returned as undeliverable or
5 not cashed after ninety (90) days will be voided. Undeliverable
6 or uncashed checks will be governed by ¶ 20 of the Settlement
7 Agreement. Any residue remaining after all payments have been
8 made shall be governed by ¶ 15(h) of the Settlement Agreement.

9 (10) with respect to any class members who file
10 untimely claims, the court hereby finds that those claims shall
11 not be allowed and that the claims administrator may notify them
12 accordingly.

13 (11) as detailed in the release set forth in the
14 Settlement Agreement and accompanying the notice to the class,
15 entry of this Final Approval Order does hereby and is deemed to
16 dismiss this action on the merits and with prejudice and shall
17 constitute a full release and discharge by the respective classes
18 and each member of those classes on behalf of himself/herself,
19 and each of his/her descendants, dependants, heirs, executors,
20 administrators, assigns, successors, agents and attorneys, of
21 defendants or their present and former affiliated companies,
22 agents, servants, attorneys, subsidiaries, affiliates,
23 stockholders, heirs, executors, representatives, successors, or
24 assigns (the "Releasees"), as to any individual or class claim
25 that was asserted in this action, as well as any meal period
26 claims, rest period claims, claims pertaining to forfeited
27 vacation time, or other claims arising out of the events, acts,
28 facts, transactions, occurrences, representations, or omissions

1 alleged in the First Amended Complaint in this action ("Released
2 Claims"), from the beginning of the respective class periods
3 through the date the court enters this Final Approval Order.

4 (12) upon satisfaction of all payments and obligations
5 hereunder, the court finds that each and every class member,
6 including the class representatives, and all successors in
7 interest shall be permanently enjoined and forever barred from
8 prosecuting any and all Released Claims against the Releasees or
9 any related entity or individual. Thus, subject to and in
10 accordance with the Settlement Agreement, even if plaintiffs
11 and/or the class members, or any of them, may hereafter discover
12 facts in addition to or different from those which they now know
13 or believe to be true with respect to the subject matter of
14 Released Claims, the plaintiffs and each class member shall be
15 deemed to have, and by operation of the judgment in this case,
16 shall have fully, finally, and forever settled and released any
17 and all claims raised in this action, or any of the other
18 Released Claims, whether known or unknown, suspected or
19 unsuspected, contingent or non-contingent, whether or not
20 concealed or hidden, which now exist, as set forth in the
21 Settlement Agreement.

22 (13) neither the fact of settlement, nor the Settlement
23 Agreement (or any other mediation or settlement-related documents
24 or data), nor any of the negotiations or proceedings connected
25 with the settlement, nor any act performed or document executed
26 pursuant to or in furtherance of the settlement, shall be
27 construed as an admission or evidence of the truth of the
28 allegations in this action, or of any liability, fault, or

1 wrongdoing of any kind.

2 (14) the court enjoins all class members (unless and
3 until the class member has submitted a timely and valid Request
4 for Exclusion Form) from filing or prosecuting any claims, suits
5 or administrative proceedings (including but not limited to
6 claims with the California DLSE) regarding claims to be released
7 by the settlement.

8 (15) this order for final approval of the settlement
9 agreement is intended to effectuate the settlement reached by the
10 parties and more fully described in the Settlement Agreement.

11 (16) the court retains jurisdiction over this matter
12 and over all parties to this litigation, including all members of
13 the classes. The court will have continuing jurisdiction over
14 this matter until all obligations outlined in the Settlement
15 Agreement have been complied with and thereafter if any issues
16 pertaining to this case and/or settlement arise.

17 (17) in the event the settlement does not become
18 effective in accordance with the terms of the Settlement
19 Agreement, this order shall be vacated.

20 DATED: October 19, 2006

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22 WILLIAM B. SHUBB
23 UNITED STATES DISTRICT JUDGE
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